SUPREME COURT

OCTOBER TERM, 19

NO. 73-632

LEONARD JOSEPH JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI [redacted]

[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. _____

LEONARD JOSEPH JOHNSON,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI OR IN THE ALTERNATIVE FOR A REINSTATEMENT OF THE PETITION FOR REHEARING IN THE NINTH CIRCUIT COURT OF APPEALS AND IN EITHER EVENT FOR A CONTINUED BAIL

Petitioner, LEONARD JOSEPH JOHNSON respectfully pray for a Writ of Certiorari Or In The Alternative For a Reinstatement of The Petition For Rehearing In The Ninth Circuit Court Of Appeals And In Either Event For a Continued Bail to review its judgment

affirming a judgment of the United States District Court for the Central District of California, sentencing petitioner to a term of seven years imprisonment.

OPINIONS BELOW

Trial in the Federal District Court was by Jury. The opinion of the Court below reversing the convictions and remanding the causes is appended hereto as Appendix "E", and is also found in the Clerks Record of the Circuit Court. The original opinion of the Court below is reported at July 23, 1973. The Judgment of the Court below is contained in the Clerk's transcript from the Circuit Court.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of judgment sought to be reviewed and the time of its entry is July 23, 1973.

The statutory provision believed to

confer jurisdiction on this Court to review the judgment in question by Writ of Certiorari is 28 U.S.C. 1254 (9).

QUESTIONS PRESENTED FOR REVIEW

I

THIS COURT SHOULD REMAND THE CASE TO THE NINTH CIRCUIT COURT OF APPEALS FOR CONSIDERATION OF A PETITION FOR REHEARING ON THE MERITS.

II

DEFENDANT JOHNSON MET THE BURDEN OF PRESENTING THE DEFENSE OF ENTRAPMENT THROUGH HIS TESTIMONY. AND THE GOVERNMENT DID NOT MEET ITS BURDEN OF SHOWING BEYOND A REASONABLE DOUBT THAT DEFENDANT WAS NOT ENTRAPPED.

III

THE NINTH CIRCUIT COURT'S RELIANCE UPON THE SUPREME COURT'S REVERSAL OF UNITED STATES v. RUSSELL, 459 F.2d 671 (1972) AMOUNTS TO AN EX POST FACTO ADJUDICATION.

IV

IF JOHNSON WAS CONVICTED ON SUBSTANTIALLY

CIRCUMSTANTIAL EVIDENCE, THE CASE IS NOT PROVED UNLESS THE JURY COULD REASONABLY CONCLUDE THAT THE EVIDENCE FAILS TO EXCLUDE EVERY REASONABLE HYPOTHESIS BUT THAT OF GUILT.

STATEMENT OF THE CASE

An indictment was filed in the Federal District Court for the Central District of California on July 31, 1972, charging Petitioner, LEONARD JOSEPH JOHNSON, along with defendants Woods and White with violating Count One, 21 U.S.C. Section 841 (a) (1) (conspiracy to distribute a controlled substance - heroin), Count Two, 21 U.S.C. 841 (A)(1) (possession of a controlled substance - heroin), [R.T. 22-28]. After being duly arraigned and pleading not guilty, the case ultimately came before the Honorable William Matthew Byrne, Jr., a Federal District Judge, on August 8, 1972. On that date, a motion for continuance was granted, trial being continued until the next day. Trial began on the 9th of August 1972. At the conclusion of the prosecution's case on August 10, 1972, defendants moved the court for judgment of acquittal on all

four counts. The motion was granted as to co four only. Defendants renewed their motion for judgment of acquittal at the close of their case, August 14, 1972. The motion was denied. On August 21, 1972, defendants made a motion for judgment of acquittal or alternatively for a new trial. It was denied. On September 11, 1972, Petitioner who had been convicted of counts one, two and three was sentenced to seven year terms on each, to run concurrently. September 14, 1972, Petitioner timely filed a notice of appeal and properly on September 20, 1972 filed a substitution of attorneys.

Petitioners and his co-defendants cases were affirmed by the Ninth Circuit Court of Appeals on July 23, 1973. A notice attached as Exhibit "A" was sent to his counsel who complied by filing a Petition for Rehearing 18 days later (within the 21 days cited as the allowable period in the notice purporting

to deal with the permissible time period and outside the 14 day period under Rule 40.) The court's letter to Petitioner's counsel requesting him to file a Petition to have his Petition for Rehearing filed "late" is enclosed as Exhibit"B" and Petitioner's prompt request for the "late" filing is included as Exhibit "C". Also enclosed is the Court's Order denying our motion to file the Petition late (Exhibit "D"). This Petition presents substantive issues of merit in reasons for granting it in contentions II, III and IV and in issue I presents a reason for remanding the cause to the Ninth Circuit Court of Appeals to consider those arguments on the merits.

STATEMENT OF FACTS

The United States called as its first witness, Silas Brandon, who testified that he was a special agent for the United States Department of Justice, Bureau of Narcotics and Dangerous Drugs, and had been so employed since January, 1972. [R.T. 139]. Further, that he had had twelve years experience in narcotic investigation prior to working for BNDD while working for the Criminal Investigation Division of the United States Army. [R.T. 139-140] Also, that he had experience in identifying heroin. [R.T. 140]

Brandon further testified that on June 14, 1972, while working for BNDD, at approximately 2:25 in the afternoon, he went to an address, 602 West Vernon, Los Angeles. [R.T. 140] and that defendant Woods resided at that address. [R.T. 140]. Further that a friend identified as Bill, accompanied him to that address and that it was Bill that

introduced him (Brandon) to Woods. [R.T. 141] Brandon stated that during a conversation taking place at the back of the 602 West Vernon address, Bill introduced him (Brandon) to Woods as the man here to purchase the heroin. [R.T. 141-142]. Woods at that time went into the residence to make a phone call. [R.T. 142]. Woods returned from the residence a few minutes later and said he could not get in touch with this man, and that he was expecting him at any time. [R.T. 142-144].

After hearing that the man Woods wanted was probably enroute to Woods' house, Brandon left. [R.T. 144]. Brandon and Bill returned at 3:00 in a government vehicle and observed defendant Johnson leaving the 602 West Vernon address in a 1969 green two door Cadillac. They followed him (Johnson) to the corner of Figueroa and Vernon Avenue to a gas station. [R.T. 144-146]. The gas station at Figueroa and Vernon was approxi-

mately twenty-five yards from the Woods address and that defendant White was in the car with Johnson. [R.T. 146-147].

Brandon was then introduced to Johnson, by Bill as the man from Detroit to purchase the drugs. [R.T. 147, 152]. Bill informed Johnson that Brandon wanted the stuff. Johnson then told Bill to return to his car and Johnson walked off in the direction of defendant White. [R.T. 149]. Johnson returned five minutes later and said things were not cool, that they should meet that nig at 7:00 at the Name of the Game Club, located at Century and Crenshaw Boulevard, Los Angele to which Brandon agreed. [R.T. 149-150].

That night Brandon met Bill at the Name of the Game Club and at approximately 7:10, defendants White and Johnson arrived. [R.T. 151-152]. All four parties were seated at one table. Johnson said, "How many pieces do you want?" [R.T. 152] and

"How was the sample?" [R.T. 153]. Brandon replied one piece, (meaning one ounce). [R.T. 153]. At that point, Johnson and Brandon left the Name of the Game Club in Johnson's Cadillac and drove to the abandoned service station approximately four houses from Johnson's residence. [R.T. 153-154]. Johnson then told Brandon he was going to meet his connection. [R.T. 154]. Brandon further testified that Johnson returned in a few minutes and stated that his connection hadn't arrived. [R.T. 155]. Brandon replied, "You are supposed to have the deal together. Why isn't it together?" [R.T. 155]. After Johnson explained his connection had let him down, Brandon again told Johnson he didn't have the deal together and requested to be driven back to the Name of the Game Club. On the way back Johnson said, "I know you can't be the man. I am going to do the deal with you in the parking lot at the Name

of the Game Club." Johnson also asked that Brandon leave his vehicle unlocked and that h would place the piece of heroin in the vehicl [R.T. 155-156]. Upon returning to the Name of the Game Club, Brandon asked defendant White, in the presence of Bill, "Why all the changes? What are you guys trying to do?" [R.T. 156].

Brandon then testified, that from his seat in the bar, he watched defendant Johnson go to his car, (Brandon's), open the driver side door, and bend over inside of the vehicle. The car was approximately fifteen yeards from where he was in the bar. [R.T. 159]. Further, that prior to unlocking the car, pursuant to Johnson's request, the car had been locked, and there was nothing on the floor of the car on the driver's side. [R.T. 160]. Johnson then left the area of the car, Brandon exited the club, went to the vehicle and found on the floor just underneath the steering wheel, a rubber condom

containing what appeared to be heroin. Brandon locked the vehicle again and started back to the club. [R.T. 161]. Before reaching the club, Brandon met Johnson in the parking lot where Johnson told him, "It's six twenty-five." Brandon then handed Johnson six hundred and fifty dollars, all in fifty dollar bills. [R.T. 161].

Brandon while on the stand, identified a rubber condom containing heroin as being the one he purchased from Johnson and pointed out where he had placed his initial on the condom. [R.T. 173]. This had been offered to Brandon on the stand as Government's Exhibit #1. Counsel had earlier stipulated to the fact that Exhibit #1, did in fact contain heroin. [R.T. 171, 172].

On June 29, at 10:35 a.m., Brandon again telephoned defendant Woods at his residence, telling him he was back in town and was ready to do business again. [R.T. 175]. Upon

Brandon's arrival at the 602 West Vernon Avenue address at approximately 11:30 a.m. Woods was on the telephone. Woods invited Brandon in and said, "I have got my man on the telephone. You can talk to him." [R.T. 177]. In that conversation, Brandon told defendant White that he wanted to purchase at least a pound and a half. [R.T. 179-180]. White then stated that that amount would take time to get together and that he would call him back at Woods' residence. [R.T. 180]. At 12:20 p.m. the phone rang at Woods' residence, Woods answered it and said it was his man, that he wanted to talk to Brandon. [R.T. 180]. Brandon then talked again to the man he recognized as White. White said it would take more time to get the stuff together and gave Brandon the number to his home and phone. [R.T. 181].

Brandon went back to the Bureau of Narcotics and Dangerous Drug office and at

1:30 p.m. he again called the Woods residence, this time leaving the number of the undercover phone at the BNDD office. [R.T. 182]. At 2:30 p.m. Brandon received a call at the Bureau of Narcotics and Dangerous Drugs Office from Woods, who said his man was there and that they were ready to do the deal. [R.T. 182]. Woods then put on the phone a man that Brandon recognized to be White. Brandon and White then negotiated a price. Eighteen thousand five hundred dollars for a pound and a half. [R.T. 182-184].

Brandon then left the office and at approximately 5:15 p.m. arrived at the Woods residence and noticed defendant Woods standing on the porch with defendant White, defendant Johnson, and a couple of females. [R.T. 184]. At that point Johnson took Brandon to a small shed-house in the rear of the residence. [R.T. 185]. Johnson

picked up from underneath a rubber mat, a brow paper bag, and shook the contents, six plastic bags, on the floor. [R.T. 185-186]. At this point, Mr. Russell, the United States Attorney was unable to qualify Brandon to testify as to the contents of those bags. [R.T. 185-197] Johnson then said, "I have six pieces." Brandon and Johnson came to an agreement that the deal would go six at a time. [R.T. 198].

Brandon then testified that Exhibit #1 and the six bags had the same texture and color but that the contents of the six bags were a little lumpier. [R.T. 199]. That he had picked one bag up and that from his experience, heroin sometimes comes in lumpy form. [R.T. 200]. At this point, Brandon left the house and reported to other agents. [R.T. 201-202].

The Government introduced tape-recording made by Agent Brandon from his office in the Bureau of Narcotics and Dangerous Drugs,

through the use of an induction coil placed on the receiver of his phone. [R.T. 202-204]. Brandon testified that the recordings accurately represent the various conversations that occurred between himself and defendants Woods and White. [R.T. 203], and that those conversations took place the 19th. (sic 29th). [R.T. 205].

Upon cross-examination, Brandon testified that the sample he referred to in the conversation with Johnson, [R.T. 153], had been acquired by agent Maxwell, having gotten the sample himself or having gotten it from Bill. [R.T. 212-213]. That the sample was heroin, [R.T. 213], but, that he did not know the source of the sample. [R.T. 214]. Brandon further testified that he did not know the identity of Bill but he did know that Bill was a known narcotics dealer. [R.T. 214-217]. Also, that he had searched Bill shortly after their arrivals at the Name of the Game Club and again shortly after leaving the Name of

of the Game Club in the parking lot. [R.T. 217-218], and that he was searching for narcotics and money. [R.T. 216-217].

Agent Maxwell testified that he received the sample, mentioned by Brandon in his conversation with Johnson, from the informant in the case, William Jackson. [R.T. 267-268]. William Jackson was working with the Bureau of Narcotics and Dangerous Drugs as an informa for consideration in his own case involving possession of cocaine. [R.T. 269].

On direct examination of Leonard Johnson, it was established that the first time he met William Jackson, was approximately the eleventh or twelfth of June at Woods' house. [R.T. 354]. Johnson further stated that he did not know Bill Jackson prior to their meeting on the twelfth [R.T. 362]. On that date there was a discussion between Johnson and Jackson, in negotiation for a sale by Jackson of heroin to Johnson. The resultant

agreement was for Johnson to loan Jackson two hundred and fifty dollars for which Johnson was to keep an amount of heroin as security. [R.T. 355-356]. The amount of heroin was approximately a little over three ounces. [R.T. 356]. That he did not have to trust Bill because he knew narcotics were worth more than two hundred fifty dollars. [R.T. 367]. This transaction was witnessed by one or more of the co-defendants. [R.T. 357]. Further, the heroin that was received by Johnson in his deal with Jackson was the same heroin that was part of the transaction that came down at the Name of the Game Club on the 14th, [R.T. 357], but that it had been cut since he (Johnson) received it from Jackson, and that he had done the cutting. [R.T. 358]. Johnson stated that prior to the transaction at the Name of the Game Club, he had met Jackson at the filling station and that Agent Brandon was there. [R.T. 358-368]. That he went to the

filling station not for a narcotics transacti but, to get his money. [R.T. 373]. That at that time Bill, aside from Brandon, instructe him to cut the heroin and sell it to Brandon for him, so that Brandon would not know that Bill was dealing. [R.T. 358-359]. Because Brandon had some relationship with a brother of Bill's and Bill did not want his brother t know he was dealing. [R.T. 359]. Also that Bill would pay him the money he had borrowed and split the profit from the deal. [R.T. 359]. At the suggestion of Bill they were to meet later at the Name of the Game Club. [R.T. 375]. And in fact, Johnson went to the Name of the Game Club to meet Bill and Agent Brandon was there. [R.T. 376]. That while at the Name of the Game Club, Johnson did put the narcotics in Agent Brandon's car. [R.T. 393].

I

THIS COURT SHOULD REMAND THE CASE TO THE NINTH CIRCUIT COURT OF APPEALS FOR CONSIDERATION OF A PETITION FOR REHEARING ON THE MERITS.

After briefing and oral argument, the Ninth Circuit Court of Appeals affirmed the case of Petitioner and his two co-defendants on July 23, 1973. A notice attached as Exhibit "A" (obviously an outdated form) was thereafter sent his counsel who complied by filing a Petition for Rehearing 18 days later (within the 21 days cited as the allowable period in the notice purporting to deal with the permissible time period and outside the 14 day period contemplated by Rule 40(a)). The Court then wrote a letter to Petitioner's counsel requesting him to file another petition asking leave of the Court to file his petition "late". That letter is attached hereto as exhibit "B" and by its terms accomplished two effects: (1) obviously it led

Petitioner's counsel to believe that Rule 40(a) was discretionary and that the court wa seriously entertaining filing the Petition timely and (2) that a decision adverse to Petitioner certainly would not jeopardize his right to petition this court for review. As a consequence, Petitioner immediately followe the court's suggestion - transmitted the motion to file the Petition for Rehearing to Court (Exhibit "C") - not until September 10, 1973 did Petitioner's counsel receive the court's order of September 7, 1973 denying the motion to file the Petition late. (See exhibit "D"). If the Court had not initially sent down false or misleading infor mation concerning the filing date for the Petition for Rehearing it would have been timely filed as explained in Exhibit "C". Even if the Court had declared the filing untimely in its letter of August 15, 1973, (see Exhibit "B"), Petitioner could easily

have petitioned this Court in a timely fashion. However, by waiting until September 7, 1973 to decline to file the Petition which reached Petitioner's counsel only on September 10, 1973, the Court effectively barred counsel from presenting his clients cause to this Court unless this Court acts to correct the situation. Meanwhile, unbeknownst to counsel, the trial Court revoked his clients bail of $15,000 and ordered a bench warrant issued and bail set in the amount of $100,000. Under all of the circumstances counsel urges this Court to (1) reinstate the Petition for Rehearing in the Ninth Circuit Court of Appeals or (2) undertake an examination of Petitioner's contention on the merits. In either event, this Court is urged to reinstate the bail in the amount of $15,000 until this cause is finally resolved.

II

DEFENDANT JOHNSON MET THE BURDEN OF PRESENTING THE DEFENSE OF ENTRAPMENT THROUGH HIS TESTIMONY. AND THE GOVERNMENT DID NOT MEET ITS BURDEN OF SHOWING BEYOND A REASONABLE DOUBT THAT DEFENDANT WAS NOT ENTRAPPED.

The Government did not meet the burden of showing no entrapment. The testimony of defendant Johnson established that prior to his first meeting with Agent Brandon, he and the informant Jackson had consummated an agreement whereby Johnson was to advance money to Jackson in exchange for approximatel three ounces of heroin to be held by Johnson as security. [R.T. 355-356]. In other words, Jackson supplied Johnson with the narcotics. Also, these same narcotics were those that Johnson transferred to agent Brandon in a deal induced by the informant. Jackson. [R.T. 357].

United States v. Bueno, 447 F.2d 903 (1971), a case decided in the Fifth Circuit, points out in detail what occurs in this situation:

"Whether entrapment is shown as a matter of law when an informer furnishes the goods to the prospective seller apparently has not been decided by this court. However, several recent cases from other jurisdictions so hold. United States v. Dillet, 265 F. Supp. 980 (S.D. N.Y. 1966); United States v. Silva, 180 F. Supp. 557 (S.D.N.Y. 1959); People v. Carmichael, 80 Ill.App.2d 293, 225 N.E.2d 765 (1961); People v. Jones, 73 Ill. App.2d 55, 219 N.E.2d 12 (1966); State v. Boccelli, 105 Ariz. 495, 467 P.2d 740 (1970). Cf., United States v. Chisum, 436 F.2d 645 (9th Cir. 1971).

It should be noted that there is no indication that this was an overall design of the law enforcement people. There is no evidence

from which to infer that the purchasing Agent knew of this activity of the Informer, who was employed only on a temporary basis. However, we believe that the facts must be viewed in their entirety for the purpose of considering their effect on this prosecution. Both the Agent and the Informer must be treated as acting in concert, each with full knowledge of the actions of the other. Sherman v. United States, 356 U.S. 369, 373-375, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958)."

The court continues:

"Instead, the government argues that the defendant produced no corroborating evidence for his testimony: that the issue of entrapment is one for the jury to determine rather than the court; that even though defendant's testimony was largely undisputed, the jury was still entitled to reject his testimony in toto; and that the evidence of the willingness of defendant to sell to the Agent permit the jury to disbelieve defendant's testimony.

And further;

"The facts of this case clearly fit within the framework of the law in this field. If defendant is to be believed, the sales of heroin were made through the creative activity of the government. The defendant would not have had the heroin to sell if it had not been purchased by the Informer. In fact, this particular heroin would apparently not have been in the United States at all, if it had not been smuggled in by the Informer."

"We hold that as a matter of law, if these facts be true, the defendant cannot be convicted of the possession, handling and sale of the heroin."

"The evidence of willingness to make the sale, which is common to the usual entrapment defense, is no answer. In such cases where the issue is willingness or unwillingness of the defendant, the defense becomes a jury question because the sale itself constitutes evidence of willingness contrary to the defense

of unwillingness. The issue there is not wha he did but why he did it, i.e., because of coercion. The issue here is what he did, i.e taking heroin from one government agent and selling it to another. The government's case cannot rest on the mere fact that he entered into the Informer's plan willingly."

"Neither party produced the Informer. If the Informer's testimony would tend to disprove the Defendant's story, it was up to the government to produce him. The Defendant having testified to facts which establish a defense as a matter of law, the government ha the duty to come forward with contrary proof, if it is to carry its ultimate burden of proving guilt beyond all reasonable doubt. United States v. Groessel, 440 F.2d 662 (5th Cir. 1971)." (Emphasis added).

Although this Court disapproved of United States v. Bueno, 447 F.2d 903 (1971) to the extent that it held that the fact that

a Government agent supplies contraband to a defendant and relies upon the sale or possession of that same contraband to convict, may not ipso facto prove entrapment in the recent case United States v. Russell, 409 U.S. 93 S.Ct. 1637 (1973), it did not rule that it "might" not and further in no way tampered with the Bruno position that the Government must produce evidence to contradict the defendant. The Court said in Bueno:

> "If the Informer's testimony would tend to disprove the Defendant's story, it was up to the government to produce him. The Defendant having testified to facts which establish a defense as a matter of law, the Government has the duty to come forward with contrary proof if it is to carry its ultimate burden of proving guilt beyond all reasonable doubt."

United States v. Groessel, 440 F.2d 662 (5th Cir. 1971). The Court went on to say

further:

> "If the government cannot come forward with evidence which contradicts Defendant's testimony, then he is entitled to discharge as a matter of law. If the government produces evidence sufficient to raise a jury question, then the case should be submitted with proper instructions in accordance with the opinion."

As the Ninth Circuit Court of Appeals stated in Notaro v. United States, (9th Cir. 1969), 363 U.S. 169, in discussing the burden of proof in entrapment cases: "Therefore, it seems quite clear that when it can be said that the issue of entrapment has fairly arisen, whether by testimony given during the presentation of the prosecution's case in chief or by testimony offered in defense, the defendant has met whatever "burden" rests upon him."

That court added in a footnote:

> "The 'burden' is insignificant. The issue of entrapment is presented 'however incredible . . . (the evidence which raises it) might appear to the trial court or to (the appellate) court.' We believe that if the defense of entrapment is claimed, a showing, however presented, that the commission of the offense was attended by the intervention of a government agent is sufficient. Lufty v. United States, 198 F.2d 760, 762 (9th Cir. 1952)."

And in United States v. Martinez, 429 F.2d 971 (1970), once the issue of entrapment appeared with respect to Martinez, it became the prosecution's burden to establish beyond a reasonable doubt that Martinez was not entrapped into the commission of the offense.

Here the evidence clearly showed that Jackson was acting as an informant for the

BNDD. [R.T. 269], and as Sherman v. United States, supra pointed out the agent and informant must be treated as acting in concert.

In this case as in the Bueno case, the prosecution did not meet its burden. No evidence contradictory to defendant's testimony was introduced and the government did not produce its informant.

Defendant Johnson in his testimony, outlined a procedure that led him into an unsuspected trap. He was introduced at a friends house to a man holding himself out as a new and friendly acquaintance - a man in financial need. Johnson agreed to loan the acquaintance money for which he would hold narcotics as security. As Johnson himself stated, "I didn't have to trust him. I was raised in Watts. I knew narcotics was worth more than two hundred fifty dollars." [R.T. 367].

The friend, the informant, then asked Johnson to make a sale for him because he

didn't want his brother to know he was dealing in narcotics. If the story was true, the informant has induced the illegal activity. And there is one glaring piece of evidence which may tend to substantiate Johnson's testimony. According to the testimony of Agents Brandon and Maxwell, the informant William Jackson had acquired a sample of heroin prior to Brandon's entrance into the case. That being the situation, there must have been prior dealings between defendant Johnson and the informant Jackson - prior dealings which the government does not explain. Until the government has met its burden of proving beyond a reasonable doubt that entrapment did not occur, the conviction should not stand.

As Judge Byrne pointed out in his instructions to the jury:

> "A person is a victim of entrapment when the government by its agent or informant, participates in or facilitates the commission of a crime to such a

degree that the law, as a matter of policy, forbids conviction. The impermissible degree of government participation is attained when the subject matter of the offense, heroin in this case, is supplied to the defendant or defendants by government agents or informants." [R.T. 639].

Chief Justice Warren in speaking for a plurality of the Court in the case of Sherman v. United States, 356 U.S. 369 (1958) stated:

"The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strate are necessary weapons in the arsenal of the police officer. However, a differe question is presented when the criminal

design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

The government in the instant case, has not met its burden of protecting the defendant against the kind of activity of which Chief Justice Warren speaks. Without the testimony of the informant in this case, the question of entrapment is not answered. Unless the government resolved the question, the conviction should not stand.

III

THE NINTH CIRCUIT COURT'S RELIANCE UPON THE SUPREME COURT'S REVERSAL OF UNITED STATES v. RUSSELL, 459 F.2d 671 (1972) AMOUNTS TO AN EX POST FACTO ADJUDICATION.

The Ninth Circuit Court's reliance upon the Supreme Court's reversal of Russell supra, disapproving Bruno, supra amounted to an ex post facto adjudication as to defendant because his defense at trial was based on the law which allowed him to rely on the failure of the government to rebut his uncontroverted evidence that the Government both supplied and received the narcotics. If the decision United States v. Russell, 93 S. Ct. 1637 (1973) had been law at the time of defendant's trial he may have elected to defend the case differently, and may have called the informant himself. Thus, the case should be remanded for a new trial.

IV

IF JOHNSON WAS CONVICTED ON SUBSTANTIALLY CIRCUMSTANTIAL EVIDENCE, THE CASE IS NOT PROVED UNLESS THE JURY COULD REASONABLY CONCLUDE THAT THE EVIDENCE FAILS TO EXCLUDE EVERY REASONABLE HYPOTHESIS BUT THAT OF GUILT.

The evidence in this case does not support a finding that every reasonable hypothesis but that of guilt is excluded. As stated in McMillan v. United States, 399 F.2d 478 (1968):

> "The government is entitled to all reasonable inferences from the evidence, but in a circumstantial evidence case the proof must be of such probative force as to lead with reasonable certainty to the inference of guilt, and must do more than create a mere suspicion. Cohen v. United States, 363 F.2d 321 (5th Cir.), cert. denied, 385 U.S. 957, 87 S. Ct. 395, 17 L. Ed.

2d 303 (1966); see Vick v. United States, 216 F.2d 228 (5th Cir. 1954). When the government relies on circumstantial evidence to support a conviction the circumstances must not only be consistent with guilt but inconsistent with every reasonable hypothesis of innocence. Barnes v. United States, 341 F.2d 189 (5th Cir. 1965)."

The prosecution has not even approached the issue of entrapment, let alone met it - the evidence of entrapment going uncontradicted And in addition, there is the testimony of agents Maxwell and Brandon that the informant, William Jackson received a sample, from a source unknown, that may be evidence of prior dealings between the defendant Johnson and the informant. This is also uncontradicted and may be probative as to the issue of entrapment. In light of the fact that the government did not meet its burden on entrapment, can reasonab minds conclude thát every reasonable hypothesis

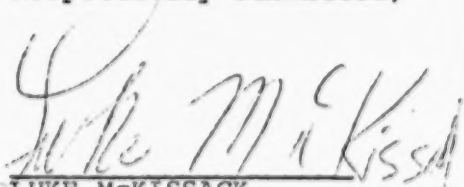
but that of guilt be excluded?

The only conclusion that can be reached is that the jurors as reasonable minds could not legally have concluded that every reasonable hypothesis of innocence had been excluded.

CONCLUSION

For the aforegoing reasons, Petitioner requests in the alternative that the Petition for Certiorari be granted or that the Petition for Rehearing be reinstated in the Circuit Court to resolve these questions of moment presented here.

Respectfully submitted,



LUKE McKISSACK
Attorney for Petitioner

AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of Los Angeles County, California; that her business address is 6430 Sunset Boulevard, Suite 521, Hollywood, California; that she is over the age of eighte years and is not a party to the above-entitled action.

That on September 28 1973, she served the within PETITION FOR WRIT OF CERTIORARI OR IN THE ALTERNATIVE FOR A REINSTATEMENT OF THE PETITION FOR REHEARING IN THE NINTH CIRCUIT COURT OF APPEALS AND IN EITHER EVENT FOR A CONTINUED BAIL, on the Petitioner in said action by placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid, in the United States mail at Wilcox Station, Hollywood, California, addressed as follows:

Solicitor General
Department of Justice
Washington, D. C. 20530

United States Attorney
1200 United States Courthouse
312 North Spring St.
Los Angeles, Ca. 90012

Barbara M. Ramsey
BARBARA M. RAMSEY

Subscribed and sworn to before me
this 28 th day of September 1973.

Alan Saltzman
Notary Public in and for said
County and State

OFFICIAL SEAL
ALAN SALTZMAN
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires June 9, 1976

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. LEONARD JOSEPH JOHNSON, *Defendant-Appellant.*	No. 73-1118
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ALVIN JAMES WHITE, *Defendant-Appellant.*	No. 72-3021
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. CLINTON CRUBET WOODS, *Defendant-Appellant.*	No. 72-3022

[July 23, 1973]

Appeal from the United States District Court
for the Central District of California

Before: KOELSCH and TRASK, Circuit Judges, and
BURNS,* District Judge

Per Curiam:

At trial, the jury found each of the Appellants guilty of violating provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801, *et seq.*, especially §§ 841(a)(1) and 846, (1970). Each Defendant appealed from the resulting judgment of the trial court. We affirm.

*Honorable James M. Burns, United States District Judge, District of Oregon, sitting by designation.

The facts in this case (which involve events on June 14 and 29, 1972) appear to follow what has come to be a common pattern. The jury could properly find the following: Operating under cover, Special Agent Brandon, of the Bureau of Narcotics and Dangerous Drugs, relied upon an informant for an approach to the Defendants. On June 14, 1972, the informant, Jackson, introduced Brandon, as a buyer of heroin from Detroit, to Woods at Woods' home. Brandon and Jackson returned later that afternoon, in Brandon's car. Johnson was seen, with White as his passenger, driving up to Woods' home. Johnson entered the home, and shortly after, returned to the car, and he and White left. In response to a wave from Johnson to Jackson, Brandon drove after Johnson to an adjacent gasoline station. Jackson then introduced Brandon to Johnson. Meanwhile, White walked around the parking lot in the manner of a lookout. After a discussion of a possible "deal" for a one ounce "piece" of heroin, Johnson then walked in the direction of the station building, following White. He returned alone to Brandon's car, but refused to deal, because he was fearful that police were watching.

Instead, Johnson arranged a second meeting for that evening at a specified club. Under the surveillance of other agents, Johnson drove White directly to the club. Brandon had already met Jackson there. In White's presence, Johnson mentioned a "sample" previously furnished to Jackson, which the informant had turned over to Agent Maxwell. Johnson discussed a "deal" for a one ounce "piece" of heroin. Johnson drove Brandon to another gasoline station parking lot and left the car. When Johnson returned to the car, a few moments later, he failed to produce any heroin. He claimed that his "connection" had failed to appear. After Brandon protested at this procedure, Johnson explained that, as a result of this procedure and Brandon's reaction to it, Johnson finally trusted Brandon and that there would be a "deal."

Johnson instructed Brandon to unlock his automobile, which had remained in the club parking lot. After they returned to the club, Brandon went back inside. Brandon watched from the club, while Johnson approached the car, opened the driver's door (which Brandon had unlocked), sat in the car, and then left. Brandon returned to the car and found a condom containing 26. 1 grams of heroin on the floor under the steering wheel. Brandon met Johnson in the

parking lot and paid him $650 in $50 bills for the requested price of $625. Brandon reentered the club and discussed the deal with Jackson and White. Brandon had one more meeting with Johnson to receive his change. White was present, while Brandon also discussed a possible future "deal" for larger quantities.

On June 29, 1972, Brandon telephoned Woods to say that he was "back in town" and "ready to do business." After arriving at Woods' house, Brandon took over from Woods a telephone conversation with White. Brandon indicated he wanted to buy one and one-half pounds of heroin. White responded that such a big order would take more time to arrange. White called back to say that further time would be required. Brandon left Woods' house. That afternoon, Brandon called Woods and Woods said that the heroin was enroute. Next, White called Brandon to explain that the heroin was being gathered together and that the price would be $18,500. White called again to confirm the terms. Woods made a final telephone call to explain that the deal would be made at his home.

Brandon drove to the house. Johnson, White and Woods were waiting. Brandon followed Johnson to a shed at the rear of the house. Johnson produced a paper bag from the ground and entered the shed, where he shook out six small, plastic bags onto the floor. The bags contained a substance that Brandon thought resembled heroin. Johnson explained that the "deal" would be completed in six ounce segments. After a protest, Brandon agreed. Woods entered the shed during the conversation as to the manner of dealing. Brandon left, claiming that he was going to his car to get his money from the trunk. The Defendants were arrested by other agents shortly thereafter.

On July 31, 1972, the grand jury returned a four count indictment. Count one charged Johnson, White and Woods with a conspiracy, for the period from June 14 through June 29, 1972, to distribute heroin in violation of 21 U.S.C. §§ 841(a)(1), 846 (1970). Count two charged Johnson alone with possession, with intent to distribute, one ounce of heroin on June 14, in violation of § 841(a)(1). Count three charged both Johnson and White with distribution of one ounce of heroin on June 14, in violation of § 841(a)(1). Count four charged all three Defendants with possession with intent to distribute six ounces of heroin on June 29, in violation of § 841(a)(1).

Prior to trial, the United States Attorney filed a notice of non-opposition to Johnson's motion to suppress evidence. The notice stated that the government did not intend to use "156 grams of heroin" obtained as the result of the search of the backyard of Woods' home on June 29, 1972. At the close of the government's case, the trial court entered judgments of acquittal for all three Defendants on count four of the indictment. The jury found the Defendants guilty as charged on the other three counts of the indictment.

On appeal, Johnson contends that he was entrapped by Jackson, the government informant. White and Woods contend that they are entitled to the benefit of the alleged entrapment. Neither White nor Woods contends that he himself was directly entrapped. None of the Defendants claims error with respect to the instructions given by the trial judge on the entrapment issue. Those instructions included a reference to "the impermissible degree of government participation" and the explanation that, if the ounce of heroin involved in the June 14, 1972, "deal" had been supplied to Johnson by the government informant Jackson, then the Defendants must be acquitted.

We need not decide whether a co-conspirator can claim, as a defense for himself, the alleged entrapment of another co-conspirator. Indeed, our review of all of the evidence convinces us that the jury was justified in rejecting the claim of entrapment as to any of the three Defendants. We need not consider the Defendants' claim that this case falls within the proposed "creative activity" doctrine of *United States v. Russell*, 459 F.2d 671 (9th Cir. 1972). After the date of oral argument, the doctrine has been rejected by the Supreme Court of the United States in *United States v. Russell*, 409 U.S. ....., 93 S.Ct. 1637, 1640-1641 (1973).

On appeal, White contends that the evidence was insufficient to justify his conviction under count one, for conspiracy to distribute heroin, and count three, for distribution of one ounce of heroin on June 14. We reject the contentions of White.

The sale on June 14 took place under circumstances not unusual in cases of this nature. The sale involved a series of different locations with secretive and furtive movement by the parties involved. There was sufficient evidence to justify a jury concluding that White not only knew of the proposed sale by Johnson to Brandon,

but also that White had aided and abetted in the initial attempt at the sale by serving as the lookout during the first meeting between Johnson and Brandon. The record does not explain why the government chose not to oppose the motion to suppress the evidence obtained in the search of Woods' home on June 29, 1972. The contents of the six plastic bags displayed to Brandon were never identified. Nevertheless, as to the activity leading up to the attempted sale on June 29, the evidence of White's statements over the telephone to Brandon is ample to justify a jury verdict of guilty on count one of the indictment. There is sufficient evidence on the record. *Glasser v. United States*, 315 U.S. 60, 80 (1942), *United States v. Magana*, 453 P.2d 414 (9th Cir. 1972).

White and Woods contend that error was committed when the trial court allowed into evidence the tape recordings taken by Brandon of his conversations with the Defendants during the negotiations leading up to the attempted second "deal." The Defendants rely upon the law of the State of California, prohibiting the interception of telephone conversations even when one of the parties has given prior consent to the interception, *Cal. Penal Code* § 632. This reliance upon a state law inconsistent with the applicable federal law is misplaced, 47 U.S.C. § 605, 18 U.S.C. § 2511 (2)(c) 1970. *See Amsler v. United States*, 381 F.2d 37, at 49-50 (9th Cir. 1967).

The other contentions asserted by the Defendants do not possess sufficient merit to justify discussion. All the contentions have been considered carefully. They are rejected. The convictions in each instance are affirmed.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 7-25-73—480

Exhibit "A"

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

Re: Nos. 73-1116, 73-1121, 73-1122 [illegible]

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered [illegible];

[illegible]
the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Dennis R. Mathews, Clerk
U.S. Court of Appeals

Exhibit "B"

RECEIVED AUG

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

August 15, 1973

Luke McKissack, Esq.
6430 Sunset Boulevard, Suite 521
Hollywood, California 90028

Re: 73-1118, LEONARD JOSEPH
JOHNSON V. UNITED STATES

Dear Mr. McKissack:

Returned herewith is the original and 24 copies of your petition for rehearing in the above entitled matter. This petition is late under Rule 40(a) of the FEDERAL RULES OF APPELLATE PROCEDURE, and the court requires a showing for filing such a late petition.

Very truly yours,

DENNIS R. MATHEWS, CLERK

By Emil E. Melfi, Jr.
Chief Deputy

ah
Enc.

RECEIVED AU

Exhibit "C"

NO. 73-1118

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEONARD JOSEPH JOHNSON,	)
	)
Petitioner,	)
	)
vs.	)
	)
UNITED STATES OF AMERICA,	)
	)
Respondent.	)

MOTION TO FILE PETITION FOR

REHEARING LATE

LUKE McKISSACK
Attorney at Law
6430 Sunset Boulevard
Suite 521
Hollywood, Ca. 90028
[213] 466 7331

Attorney for Petitioner

NO. 73-1118

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEONARD JOSEPH JOHNSON, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	MOTION TO FILE PETITION FOR REHEARING LATE

TO THE HONORABLE JUDGES OF THE ABOVE ENTITLED COURT:

Appellant LEONARD JOSEPH JOHNSON by his attorney LUKE McKISSACK hereby petitions this court to file his petition for Rehearing which raises substantial issues, was delivered to the court 18 days after the judgment affirming his conviction on the mistaken assumption that such filing was in full compliance with the Federal Rules of Appellant Procedure as explained in the affidavit of the undersigned and accompanying Exhibit "A".

Luke McKissack

LUKE McKISSACK
Attorney for Petitioner

AFFIDAVIT IN SUPPORT OF MOTION TO FILE PETITION FOR REHEARING LATE.

I am the attorney for appellant LEONARD JOSEPH JOHNSON. I am licenced to practice before this tribunal.

The judgment by this court affirming the conviction was entered on July 23, 1973 as stated in Exhibit "A" attached. Moreover, Exhibit "A" related to the defendant and the undersigned that we had 21 days within which to file a petition for rehearing. That document which is outdated or certainly misleading, is attached as Exhibit "A". Based upon the assumption that there was a 21 day allotment within which to file the appropriate petition, it was formulated and filed with this court within the 21 day period. The undersigned was personally absent from the jurisdiction, handling another case in South Dakota during the crucial period when the motion was to be filed and my office filed the brief consistent with the explicit rules sent down by this court. Needless to say, the defendant had nothing to do with the date of filing and had we not received a notice to the effect that 21 days was available, a check would have been made to ascertain the time period available within which to file a petition for rehearing. Therefore, in the interest of justice, appellant again lodges with this court for consideration, a petition for rehearing.

Respectfully submitted,

LUKE McKISSACK
Attorney for Petitioner

bscribed and sworn to before me

is 21st day of August 1973

tary Public in and for
unty of Los Angeles, State of California

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 6430 Sunset Boulevard, Suite 521, Hollywood, California, 90028.

On August 21, 1973, I served the within MOTION TO FILE PETITION FOR REHEARING LATE on the Petitioner in said action by placing a true copy thereof enclosed in a sealed envelope with postage prepaid thereon in the United States Post Office mail box at Los Angeles, addressed as follows:

U.S. Attorney
1200 United States Courthouse
312 N. Spring St.
Los Angeles,Ca. 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed August 21, 1973 at Los Angeles, Ca.

BARBARA M. RAMSEY

Subscribed and sworn to before me this 21st day of August 1973

Martha Goldin

Notary Public in and for
County of Los Angeles, State of California

OFFICIAL SEAL
MARTHA GOLDIN
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires Dec. 9, 1975

Exhibit "A"

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

Re: No. 72-1116, 72-3021, 72-3022 USA Vs. LEONARD [illegible], DAVID JAMES KNITZ, CLINTON CROCKETT WOODS

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered [illegible]-73

[illegible]
the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Dennis R. Mathews, Clerk
U.S. Court of Appeals

Exhibit "D"

RECEIVED SEP 10 1973

FILED
SEP 7 1973
U. S. COURT OF APPEALS CLERK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	No. 73-1118
LEONARD JOSEPH JOHNSON,	)	
Defendant-Appellant.	)	

Before: KOELSCH and TRASK, Circuit Judges, and
* BURNS, District Judge

O R D E R

Appellant's motion to file a late petition for rehearing is denied.

* Honorable James M. Burns, United States District Judge, District of Oregon, sitting by designation.

SUPREME COURT, U. S.
FILED
NOV 20 1973
MICHAEL RODAK, JR., CLERK

No. 73-632

In the Supreme Court of the United States

OCTOBER TERM, 1973

LEONARD JOSEPH JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-632

LEONARD JOSEPH JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Central District of California, petitioner and co-defendants Alvin James White and Clinton Crubet Woods were convicted of conspiracy to distribute heroin, in violation of 21 U.S.C. 846. Petitioner was also convicted of two counts of possession and distribution of heroin, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to concurrent terms of seven years' imprisonment on each count. The court of appeals affirmed (Pet. App.). Petitioner's motion to file a late petition for rehearing was denied on September 7, 1973.

Petitioner did not appear before the district court on September 10, 1973, when the judgment of the court of appeals was to be spread on the record. His bail was forfeited, new bail was set at $100,000, and a bench warrant was issued for him. Petitioner has to

date neither posted new bail nor surrendered himself. Because of petitioner's fugitive status, further review is not warranted. See *Molinaro* v. *New Jersey*, 396 U.S. 365.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

DOJ-1973-11